Office - Supreme Court, U.S
FILED
APR 10 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1412

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX McDONALD
on her own behalf and on behalf
of all others similarly situated,

*Petitioner,*

*v.*

UNITED AIR LINES, INC.,
a corporation,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

*Respondents.*

## BRIEF OF RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CALVIN P. SAWYIER
Counsel of Record
DANAE K. PROUSIS
WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, Illinois 60603
(312) 558-5600

PAUL M. TSCHIRHART
P. O. Box 66100
Chicago, Illinois 60666
(312) 952-4192
*Counsel for Respondent*
*United Air Lines, Inc.*

BEST AVAILABLE COPY

24pp

## QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the allocation of the burden of proof in petitioners' individual entitlement hearings—during which United Air Lines, Inc.'s liability to petitioners was determined—as applied by Special Masters under the district court's Order of Reference.

2. Whether the court of appeals properly refused to review the general statement of the burden of proof allocation in the Order of Reference, as distinguished from the application of that allocation in the actual hearings which were appealed, where petitioners waited for nearly 9 months and until hundreds of entitlement hearings had been held before raising an objection to the Order of Reference in general.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| STATEMENT OF THE CASE | 1 |
| ARGUMENT | |
| I. THE SEVENTH CIRCUIT AFFIRMED THE ALLOCATION OF THE BURDEN OF PROOF AS APPLIED BY SPECIAL MASTERS UNDER THE DISTRICT COURT'S ORDER OF REFERENCE | 7 |
| II. PETITIONERS FAILED TO MAKE TIMELY OBJECTION TO THE GENERAL STATEMENT OF THE BURDEN OF PROOF ALLOCATION IN THE ORDER OF REFERENCE, AS DISTINGUISHED FROM THE APPLICATION OF THAT ALLOCATION IN THE ACTUAL HEARINGS WHICH WERE APPEALED. | 11 |
| CONCLUSION. | 17 |

## TABLE OF AUTHORITIES

*Cases:*


| | PAGE |
|---|---|
| Association Against Discrimination v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982) | 10 |
| Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955) | 14 |
| Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975) | 15 |
| City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) | 16 |
| Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) | 15 |
| Coyner v. United States, 103 F.2d 629 (7th Cir. 1939) | 13 |
| Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976) | 13 |
| Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980) | 15, 16 |
| Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) | 15, 16 |
| First Iowa Hydro Elec. Corp. v. Iowa-Illinois Gas & E. Co., 245 F.2d 613 (8th Cir.), cert. denied, 355 U.S. 871 (1957) | 13 |
| Franks v. Bowman Transportation Co. 424 U.S. 747 (1976) | 10, 15 |
| Gillespie v. United States Steel Corp. 379 U.S. 148 (1964) | 14 |
| Hayes v. Foodmaker, Inc. 634 F.2d 802 (5th Cir. 1981) | 13 |
| International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) | 5, 6, 10, 15 |
| La Buy v. Howes Leather Co., 352 U.S. 249 (1957) | 14 |

PAGE

Magnaleasing, Inc. v. Staten Island Mall, 428 F. Supp. 1039 (S.D. N.Y.), aff'd 563 F.2d 567 (2d Cir. 1977) ..... 13

McDonald v. United Air Lines, Inc. 587 F.2d 357 (7th Cir. 1978), cert. denied, 442 U.S. 934 (1979) ..... 2, 3, 4, 7

McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) ..... 10

Morgan v. Kerrigan, 401 F. Supp. 270 (D. Mass. 1975) ..... 13

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) . 16

Ramsey v. Home Mortgage Co., 47 F.2d 621 (E.D. N.C. 1931) ..... 13

Richardson v. Byrd, 709 F.2d 1016 (5th Cir.), cert. denied, — U.S. —, 104 S. Ct. 527 (1983) .. 10

Romasanta v. United Air Lines, Inc. 717 F.2d 1140 (7th Cir. 1983), cert. denied — U.S. — 104 S.Ct. 1928 (1984) ..... 3

Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967) ..... 15

Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), cert. denied, — U.S. — 105 S.Ct. 511 (1984) ..... 13

Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971) ..... 2

Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir.), cert. denied, 434 U.S. 844 (1977) ..... 2

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... 5, 6

United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), aff'g Romasanta v. United Air Lines, Inc., 537 F.2d 915 (7th Cir. 1976) ..... 2

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) . 16

PAGE

Statutes:

Title VII, Civil Rights Act of 1964 42 U.S.C. § 2000e *et seq* ..... 2
United States Code 28 U.S.C. § 1291 ..... 14
United States Code 28 U.S.C. § 1292(a)(1) ... 6, 14, 15

Federal Rules of Civil Procedure:

Rule 53. ..... 3
Rule 54(b) ..... 6, 14, 15, 16

Rules of the Supreme Court of the United States:

Rule 17. ..... 13

Treatises:

5A Moore's Federal Practice 53.05[3] (2d ed. 1984). ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

LIANE BUIX McDONALD
on her own behalf and on behalf
of all others similarly situated,

*Petitioner,*

*v.*

UNITED AIR LINES, INC.,[1]
a corporation,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

*Respondents.*

## BRIEF OF RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## STATEMENT OF THE CASE

Petitioners misstate both the nature of the class entitlement hearings in this unique Title VII case and the holdings of the Seventh Circuit challenged in this petition. Therefore, Respondent United Air Lines, Inc. ("United") restates the pertinent facts.[2]

[1] United Air Lines, Inc. is a corporation, and its parent corporation is UAL, Inc. with offices at 1200 Algonquin Road, Elk Grove Village, Illinois 60007.

[2] "App." cites to portions of the Appendix to Petition.

The "long and tortuous" (App. 1a) history of this litigation began in 1968 with an individual suit alleging United's "no-marriage" rule was violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). In 1971, the no-marriage rule, which United had eliminated in 1968, was held to have been illegal.[3] *Id.* Only after class action status was denied and the claims of all individual plaintiffs were fully settled (R. 127),[4] did Liane McDonald, a putative class member, intervene. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977). Subsequently, a class was certified to include only those stewardesses who resigned or terminated because of the no-marriage rule. *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 359 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).

In 1978, the Seventh Circuit held that although claimants who failed to protest their resignations from United were not foreclosed automatically from class membership, they faced a more difficult burden of demonstrating entitlement than claimants who had protested by filing EEOC charges or grievances:

> The stewardesses who resigned must, as counsel for the plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief. Although it may be significantly easier for those who protested to make such a showing, we reiterate our *Romasanta* ruling that the fact that she did not protest will not foreclose a class member from making such a showing.

---

[3] The EEOC had puzzled for some time over whether the no-marriage rule constituted sex discrimination. When the EEOC finally deemed the rule unlawful (and before any court had so held), the policy was immediately thereafter (in 1968) abandoned by all airlines including United. Of all the airlines which had the rule, only United has been subjected to the massive liability of this class suit — on reasoning that was trenchantly critized by Judge (now Justice) Stevens in dissent and which has been expressly disapproved by other courts. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1202-1207 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, 894 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977).

[4] "R" cites to portions of the record on appeal.

*McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 360 n.4 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).

On remand, the Association of Flight Attendants ("AFA") was permitted to intervene to represent incumbent flight attendants (*Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140, 1143 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 1928 (1984)), and approximately 1750 potential class members were identified. Prior to commencing individual hearings to determine actual class membership, the district court held evidentiary hearings and concluded that class members would be entitled to reinstatement. *Id.*

In 1980, the district court, mindful of the unique characteristics of this case, determined that individual evidentiary hearings before special masters appointed pursuant to Federal Rule of Civil Procedure 53 would be the most appropriate means of determining whether a particular claimant could demonstrate entitlement to class membership. (R. 416) Thus, on October 27, 1982, the district court issued an Order of Reference setting forth legal principles and evidentiary standards which the masters were to apply in formulating their individual reports and recommendations regarding class entitlement to the district court. (App. 35a, 3a) Consistent with footnote 4 in *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 360 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979), quoted above, the Order of Reference (¶ 4) provides that each "claimant has the burden of proving that she is a member of the class." (App. 36a) Once a claimant makes a *prima facie* case for entitlement, the parties opposing the claim have the "*burden of going forward* with a showing that some reason other than the no-marriage rule led to the end of her employment as a flight attendant." (¶ 5, App. 36a; emphasis added) Paragraph 6 of the Order sets forth certain indicia (marriage concealment, transfer to ground job, subsequent work history, contemporaneous protest) suggesting a claimant left her flight attendant job because of the no-marriage rule. (App. 36a-37a) Para-

graph 7 lists other indicia (failure to apply for transfer to ground job, failure to seek other work, failure to apply for unemployment compensation, the existence of other reasons for termination) indicating a claimant's voluntary termination unrelated to the rule. (App. 37a)

On December 23, 1982, the AFA filed a motion to reconsider paragraph 5 of the Order of Reference, arguing that paragraph 5 should be eliminated and that the claimant's marital status at the time of termination or resignation merely be added as an additional factor to be considered under paragraph 6. (R. 681-682) United supported the AFA's motion. (R. 684) Neither the AFA nor United sought modification or clarification of paragraph 4 which places the burden of proving class membership upon the claimant. Although the class opposed the AFA's motion to reconsider, at no time prior to July 12, 1983 did the class ever object to or ask the court to modify, clarify or reconsider any portion of the Order of Reference pertaining to the burden of proof.[5] In ruling on the AFA's motion to reconsider, on May 19, 1983, the district court stated that "it certainly was not the intention that the plaintiffs could come in with a big stack of wedding licenses and say prove these people — or have the burden of going forward to show that they left for some other reason or some reason other than the rule." (R. 1239, Vol. 4 at 4-6) The court confirmed that pursuant to the Order of Reference "the burden of going forward, not the burden of persuasion" shifted to United once a claimant established a *prima facie* case, and that "the burden of proof always remains on the plaintiff." *Id.*

Eight "test" cases were tried the week of January 17, 1983 and decisions in these cases were rendered on February 18, 1983. The class entitlement hearings commenced on a regular

---

[5] In sharp contrast to the class' failure to object to the burden of proof, the class on January 31, 1983 and May 19, 1983, did ask the court to reconsider and modify unrelated provisions of the Order of Reference, i.e., scheduling of hearings and cut-off dates. (R. 689, 826)

basis on April 18, 1983. Not until July 12, 1983, nearly 9 months after the Order of Reference was issued and 5 months after the first 8 decisions were rendered, did the class challenge the allocation of proof provisions in the Order. (R. 927) By that time, the special masters had conducted 126 entitlement hearings and had denied entitlement to some 38 claimants.

The class presented its challenge to the burden of proof provisions in the Order of Reference by appealing several of the masters' adverse recommendations. In these appeals, the class argued that, pursuant to *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), once a claimant makes a *prima facie* showing, United has the burden of proving by clear and convincing evidence that its no-marriage rule was not the cause of claimant's termination. On September 9, 1983, the district court rejected the class' argument primarily on the ground that those flight attendants who resigned (as opposed to those who were discharged by United upon marriage) were similar to the nonapplicants in *Teamsters* who had the burden of proving that they were actual discriminatees and thus entitled to be treated like the rejected applicants who were presumptively entitled to relief. (App. 23a) Significantly, the district court concluded that:

> [T]he manner and burden of proof is not the same for all the varying circumstances in Title VII cases. It must be tailored to the realities of the case, including how the evidence could or would be presented. See *Teamsters v. United States, supra.* Given the nature of the hearings so far conducted, this court is satisfied that the structure suggested, but not mandated, by *Texas Department of Community Affairs v. Burdine, supra,* should continue to be followed. (App. 25a)

On the same date, the district court adopted the masters' adverse recommendations as to 11 claimants. (App. 27a) Appeals were taken from the adverse rulings to the Seventh

Circuit pursuant to 28 U.S.C. § 1292(a)(1) and Rule 54(b). (R. 1100) A second set of masters' adverse recommendations were adopted by the district court in orders of January 5, 1984 and February 1, 1984 (App. 29a-33a) and also appealed to the Seventh Circuit pursuant to 28 U.S.C. § 1292(a)(1) and Rule 54(b). (R. 1201) The two appeals were consolidated.

Contrary to petitioners' contention, the Seventh Circuit decision which petitioners are asking this Court to review contains no recognition "that a substantial issue was presented as to whether ... *Teamsters* ... or the *Burdine* decision, provided the appropriate model for allocation of the burden of persuasion here." (Pet. 7, 9) The Seventh Circuit did discuss both *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in the context of these particular class entitlement hearings and determined that neither *Teamsters* nor *Burdine* was directly comparable to this case. (App. 6a-9a) Agreeing with the district court's position, the Seventh Circuit stated:

> In the final analysis, it is perhaps most useful only to recall the maxim that each Title VII case may be unique to its own factual setting and therefore courts must be prepared to employ innovative procedural structures in facilitating the necessary determinations. (App. 8a)

Further, although the court of appeals affirmed the Order of Reference, finding the meaning of paragraphs 4 and 5 "abundantly clear," it chose not to review the merits of the Order in general because petitioners failed to timely challenge the Order. (App. 8a-9a) However, the court did review the application of the principles of the Order of Reference to nine specific cases, affirming six, reversing one, and remanding two. (App. 12a-17a)

## ARGUMENT

### I. THE SEVENTH CIRCUIT AFFIRMED THE ALLOCATION OF THE BURDEN OF PROOF AS APPLIED BY SPECIAL MASTERS UNDER THE DISTRICT COURT'S ORDER OF REFERENCE.

The petition for writ of certiorari rests entirely on the false premise that the Seventh Circuit opinion "deprives petitioners of appellate review concerning the correct burden of proof governing their individual reinstatement hearings." (Pet. 8) In fact, what the Seventh Circuit did was to consider and define with particularity the "appropriate procedures" to be followed "in facilitating the necessary determinations" in the entitlement hearings in *this* Title VII case—"unique to its own factual setting." (App. 10a-11a, 8a)

The special nature of class membership in this unique Title VII case calls for just the type of *ad hoc* definition of appropriate burden of proof procedures that the court of appeals' opinion provides. Here class membership turns, not just on the existence of some facts which can be objectively established (i.e., dates of employment, date of marriage), but on the establishment of a subjective state of mind existing many years ago. "The stewardesses who resigned must, as counsel for plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief." *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 360 n.4 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).[6]

---

[6] The subjective nature of the testimony adduced at the entitlement hearings was pointed out by the district court:

> The claimants left service as flight attendants fifteen or more years ago. The hearings necessarily involve an exploration into what claimants then did, recollections quite possibly affected by time and by present desires. *They also involve what claimants otherwise would have done, absent the no-marriage rule, a present reconstruction of what one then would have done even though, the choice not then being present, the claimant may not have then*

*(Footnote continued on following page.)*

The following specific blueprint for allocation of the burden of proof in the entitlement hearings was drawn by the Seventh Circuit in its opinion:

> Once the claimant has met her initial burden, the burden of production shifts to the defendant to rebut the factual presumption that the claimant resigned because of the rule, although the ultimate burden of persuasion remains on the claimant ...
>
> ...[W]here United and AFA have not come forward with any evidence—whether based on extrinsic factors such as the claimant's subsequent employment history or on impeachment through cross-examination of the claimant herself—the defendant will have failed to rebut the presumption established by the claimant's prima facie case [from her demonstrating a temporal link between her termination as a stewardess and her marriage].
>
> * * *
>
> The master, of course, can make a determination that the claimant's professed past intention to continue her employment is not credible. Nevertheless, the master's determination should be based on specific evidence adduced by United or AFA, whether by cross-examination or otherwise. If such evidence is not available in any form, then the master should conclude that the defendant has failed to meet its burden, and thus failed to rebut the factual presumption that the claimant's resignation was the result of the no-marriage rule. (App. 10a-11a)

Nothing could constitute a more considered decision regarding petitioners' contention that United bears the ultimate burden of

---

*(Footnote continued on following page.)*

*consciously contemplated the alternatives. The masters have been faced with the difficult and uncertain task of determining what would have happened in the past had circumstances been different.* While that determination may well not rest upon "credibility" in the narrow sense—a conclusion that someone was lying—it cannot be ignored that claimants are testifying to present subjective beliefs as to what they would have done in the somewhat distant past if they then had had alternatives. Such beliefs are obviously, despite the utmost good faith, subject to the twin distortions of time and self-interest. (App. 31a; emphasis added)

persuasion in the entitlement hearings. Each petitioner's case was thoroughly reviewed by the court of appeals. Petitioners' real complaint is not that their contentions were not considered but that the court of appeals after considering them, adopted, under the particular circumstances of this case, a burden of proof schemata which is contrary to petitioners' position and which follows that urged by United and applied by the district court and the special masters in all of the 673 entitlement hearings held to date.[7]

What the Seventh Circuit did not reach or consider—and properly so—was "the appropriateness of [the particulars of procedure set forth in the Order of Reference] in determinations of class membership in *future* Title VII cases . . . [*g*]*iven the unique characteristics of these claimants and their differences from the usual Title VII claimants* . . . " (App. 8a-9a, n. 3; emphasis added) Petitioners apparently believe themselves entitled to an abstract announcement of a set of broad principles governing Title VII class membership determinations in general. However, as the court pointed out in the above quotation, consideration on that level of petitioners' contentions concerning the proper allocation of the burden of proof is entirely inappropriate.[8]

In affirming the Order of Reference, the Seventh Circuit did specifically consider petitioners' arguments concerning the proper allocation of the burden of proof. In doing so, the court recognized, contrary to petitioners' contention, that the entitle-

---

[7] As of this date, 673 hearings have been held; 445 have been found to be class members; 215 have been denied class membership; and 13 decisions are still pending. The class has filed objections to every adverse decision.

[8] Judge Eschbach, in his separate opinion, emphasized the above distinction between "that part of the court's opinion which affirms the district court's allocation of the burdens of proof and production" and "the decision not to review the merits of the Order of Reference" as a general matter. (App. 18a)

ment hearings are not "remedial" (Pet. 4, 6, 12) in nature. This unique Title VII class action has not followed the usual stage I-liability/stage II-remedial structure of other Title VII class actions. Although the no-marriage rule was long ago held to be discriminatory, United's liability with respect to each claimant is determined solely in the entitlement hearings. The remedial phase of this suit was tried on a class-wide basis at evidentiary hearings conducted in 1981 with respect to reinstatement and in 1982 concerning backpay. As the Seventh Circuit pointed out, the prior adjudication of the illegality of the no-marriage rule did not "identify exactly who was injured by this illegal conduct, and *only those who were in fact injured are entitled to relief.*" (App. 7a; emphasis added) Thus, the sole issue determined in the entitlement hearings is "who belongs to the plaintiff class, that is, who has been a victim of the proven discrimination." (App. 7a) The court of appeals' refusal to accept petitioners' characterization of the hearings as "remedial" is consistent with its conclusion that these claimants "are in fact directly comparable to neither group [applicants and nonapplicants] in *Teamsters.*" (App. 8a)[9] Thus, the court concluded that each Title VII case is unique to its own factual setting and "therefore courts must be prepared to employ

---

[9] Accordingly, Petitioners' reliance on the post-*Teamsters* cases is misplaced. (Pet. 12, n. 9) Moreover, those cases are clearly distinguishable: *Association Against Discrimination v. City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982), and *McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982), are hiring and promotion cases in which class-wide discrimination had already been established with respect to identifiable groups, and the courts were concerned primarily with the issue of remedies. *Richardson v. Byrd,* 709 F.2d 1016 (5th Cir. 1983), *cert. denied,* ____U.S. ____, 104 S. Ct. 527 (1983), is a true "phase II—remedial" case in which class-wide liability had already been determined, leaving only the backpay claims to be resolved. Petitioners' reliance on *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763-64 (1976) (Pet. 12), is also inappropriate because the class entitlement hearings do not represent the remedial phase of this Title VII case.

innovative procedural structures in facilitating the necessary determinations." (App. 8a) Accordingly, the court of appeals approved the "innovative procedural structures" and the allocation of proof standards as applied under the Order of Reference in this unique case.

## II. PETITIONERS FAILED TO MAKE TIMELY OBJECTION TO THE GENERAL STATEMENT OF THE BURDEN OF PROOF ALLOCATION IN THE ORDER OF REFERENCE, AS DISTINGUISHED FROM THE APPLICATION OF THAT ALLOCATION IN THE ACTUAL HEARINGS WHICH WERE APPEALED.

The Seventh Circuit made the following significant findings:

> It thus seems clear that the plaintiffs interpreted the Order of Reference to shift only the burden of production, and not the burden of proof, to the defendant once the claimant has made the threshold showing. This, of course, is consistent with paragraph 4 of the Order of Reference which explicitly states that the claimant has the burden of proving she is a member of the class. At no point prior to initiation of the appeals from the masters' determinations did the plaintiff class apparently challenge, even indirectly, paragraph 4 of the Order of Reference. (App. 5a-6a)

Further, the court found that paragraphs 4 and 5 of the Order of Reference were "abundantly clear" and that the district court's subsequent order "did not significantly change the allocation of burdens enumerated in the Order of Reference." (App. 8a-9a)

The record amply supports these findings. The class raised no challenge whatsoever to the burden of proof standard until almost 9 months after the Order of Reference was issued in October 1982. Inexplicably, petitioners now claim that they "consistently maintained" that the allocation of the burden of persuasion was "incorrect and highly prejudicial." (Pet. 15, n.

13) Yet, petitioners cannot point to one such objection made to the Order of Reference prior to the first set of consolidated appeals taken to the district court in July, 1983. Moreover, although petitioners contend that the allocation of the burden of proof is of "crucial importance" (Pet. 11) to them in the hearings, petitioners never sought to stay further hearings until the issue was reviewed on appeal and even opposed United's request for a stay. (R. 733) By the time this case was argued to the court of appeals, over 600 claims had been heard.[10] As the court of appeals concluded:

> [T]he class failed to object to the Order when it had ample opportunity to do so before the beginning of the individual hearings. . . . To permit the plaintiffs to wait to challenge the Order until after several hundred hearings have been held and then to attempt to force rehearings on those claims which received adverse recommendations does not further the goal of efficient judicial administration. (App. 9a)

Petitioners' argument is based on the false premise that the Seventh Circuit promulgated a broad new rule that parties in complex litigation have no choice but to "seek appellate review of clearly interlocutory orders issued during the case lest they find they have in the name of 'efficient administration of justice' lost their right to appellate review." (Pet. 8) Clearly, no such rule was announced by the Seventh Circuit. In fact, the court merely applied black letter law in the context of the unique circumstances in this case. The Seventh Circuit upheld the rule that a party who desires to challenge generally an order of reference must make an objection at or prior to the entry of the order of reference; or, at the very latest, the party must make a timely motion to the court, and not to the master, asking the court to revoke or modify the reference. In the absence of some such objection, proceeding before the master constitutes a

---

[10] Contrary to petitioners' assertion (Pet. 15, n. 13), the issue of the class' failure to timely object to the Order of Reference was raised and argued at oral arguments before the court of appeals.

waiver of any potential objection to the reference. 5A *Moore's Federal Practice* ¶ 53.05[3] (2d ed, 1984); *Hayes v. Foodmaker, Inc.*, 634 F.2d 802, 803 (5th Cir. 1981) (objection to reference first made at hearing before the special master was waived as untimely); *Magnaleasing, Inc. v. Staten Island Mall*, 428 F. Supp. 1039, 1045 (S.D. N.Y.), *aff'd* 563 F.2d 567 (2d Cir. 1977) (objection to reference under Rule 53(e) was untimely where not made until appearance before magistrate); *First Iowa Hydro Elec. Corp. v. Iowa-Illinois Gas & E. Co.* 245 F.2d 613, 628 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957) (failure to make timely objection to reference at time of the order or promptly thereafter constitutes a waiver of error and objections made only to the master are unavailing); *Coyner v. United States*, 103 F.2d 629, 635 (7th Cir. 1939) (failure to move before the trial court to revoke a reference is tantamount to acquiescence and consent); *See also, Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir.), *cert. denied*, ____ U.S.____, 105 S. Ct. 511 (1984); *Morgan v. Kerrigan*, 401 F. Supp. 270, 272 (D. Mass. 1975); *Ramsey v. Home Mortgage Co.*, 47 F.2d 621, 636 (E.D. N.C. 1931). The rule requiring that any objection to an order of reference be made promptly "permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain 'a second bite at the apple' by withholding his objection to the reference until after the report." *Cruz v. Hauck*, 515 F.2d 322, 331 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

Petitioners raise other arguments in support of their petition, none of which satisfies the guidelines set forth in Supreme Court Rule 17 justifying the granting of the writ of certiorari. As stated above, the court of appeals did not announce a new rule requiring parties to seek review of all interlocutory orders. Therefore, there clearly is no conflict with "the historic federal policy against piecemeal appeals." (Pet. 8) Nevertheless, petitioners persist in arguing that the Seventh Circuit has undermined this policy by also reducing its appellate jurisdiction on an "ad hoc" basis. (Pet. 8-9, 13) However, the only case relied

upon by petitioners, *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176 (1955), does not support their contention. In that case, this Court held that an order denying a stay under the United States Arbitration Act is not the refusal of an interlocutory injunction within the meaning of 28 U.S.C. § 1292(1). In so holding, this Court stated that it is "the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction" occurs because such "choices fall in the legislative domain." 348 U.S. at 181-82. In this case, petitioners took appeals from the adverse rulings to the Seventh Circuit under 28 U.S.C. § 1292(a)(1) as orders denying them the injunctive relief of reinstatement. (R. 1100) The Seventh Circuit accepted jurisdiction on this basis (as well as under Rule 54(b)) and fully reviewed the underlying decisions including the application of the Order of Reference to each case. The court's refusal to review the Order of Reference in the abstract because petitioners failed to object promptly to the Order in general does not amount to an "ad hoc" reduction of appellate jurisdiction. Thus, petitioners have failed here too in demonstrating any conflict with the policy against piecemeal appeals.

Next, petitioners argue, on the one hand, that the Order of Reference was an unappealable, interlocutory order and, on the other hand, that they were not required to appeal the Order earlier than they did. (Pet. 9-11) In so arguing, petitioners sidestep the real issue. Inasmuch as the Order of Reference laid the ground rules for some 1750 potential hearings, there is little doubt that a timely objection to the Order followed by an appeal under the doctrine of *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 154 (1964) (28 U.S.C. § 1291: if "fundamental to the further conduct of the case") or a *mandamus* petition under the doctrine of *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259-60 (1957) (supervisory control over proper judicial administration when "exceptional circumstances" exist) would have succeeded in bringing this issue before the court of appeals for determination prior to the holding of more than 600 hearings completed as of the date of

the court of appeals' decision. The court properly considered the adverse consequences that a change in the general statement of the burden of proof standard at this late stage in the hearing process would have on "the goal of efficient judicial administration." (App. 9a) Such consideration was especially appropriate in light of the petitioners' inexcusable delay in objecting to the Order of Reference. *See Browzin v. Catholic University of America,* 527 F.2d 843, 850, n.15 (D.C. Cir. 1975); *Skogen v. Dow Chemical Co.,* 375 F.2d 692, 703 (8th Cir. 1967). That the district court "welcomed appellate review" (Pet. 7) at the time petitioners took this case to the Seventh Circuit is not dispositive, as petitioners would have this Court believe, of the question of efficient judicial administration. As the Seventh Circuit clearly recognized, the essentially declaratory and abstract relief which petitioners untimely requested would, if granted, severely disrupt the efficient judicial administration of this case.

Finally, petitioners delude themselves in arguing that this case raises "an important issue of the court of appeals' interference with the district court's management of complex litigation." (Pet. 13) In support of this contention, petitioners cite portions of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 375-76 (1977), and *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 763, 770 (1976). However, these cases deal with the fashioning and implementation of appropriate remedies and clearly are inapplicable to entitlement hearings in which United's liability to individual claimants is the only issue. Moreover, the citations to *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 8 (1980), and *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 474 (1978) add nothing to petitioners' argument since the court of appeals here did not dispute the district court's determination that their appeals were appropriate under 28 U.S.C. § 1292(a)(1) or Rule 54(b). Indeed, none of the other cases relied upon by petitioners supports their argument: In *Dayton Board of Education v.*

*Brinkman,* 433 U.S. 406, 418 (1977), the court of appeals improperly imposed a remedy "entirely out of proportion" to the constitutional violations found by the district court without upsetting the lower court's findings or conclusions of law. *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655 (1978), held that the issuance of a writ of *mandamus* by a court of appeals impermissibly interfered with the district court's discretion, established by prior case law, to defer to a concurrent state action. In *Curtiss-Wright, supra,* the issue was the standard of review exercised by the court of appeals in determining the propriety of Rule 54(b) certification. Finally, *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), involved a court of appeals' reversal of a *forum non conveniens* determination which conflicted with every other federal court of appeals' decision on the issue.[11]

The Seventh Circuit was not bound by the district court's action permitting tardy, albeit abstract, review of the Order of Reference, particularly since such a review might have adversely affected efficient judicial administration. In refusing to review the Order in general because of the inherent prejudice in such review, the Seventh Circuit did not interfere with the district court's management of the case.

---

[11] Petitioners also argue that because the district court found no procedural default, the appellate court should have reviewed the Order of Reference in general. However, in the case relied upon by petitioner, *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 257 (1981), this Court agreed to review a punitive damages question in a 42 U.S.C. § 1983 case because it was of broad significance to and likely to recur in 1983 litigation against municipalities. The same cannot be said of the issues in this clearly unique case.

## CONCLUSION

Petitioners have advanced no valid reason justifying a review on writ of certiorari. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

CALVIN P. SAWYIER
Counsel of Record
DANAE K. PROUSIS
WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, Illinois 60603
(312) 558-5600

PAUL M. TSCHIRHART
P. O. Box 66100
Chicago, Illinois 60666
(312) 952-4192
*Counsel for Respondent*
*United Air Lines, Inc.*